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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALBERTO PERALES ALVAREZ

Petitioner

VS.

THE STATE OF TEXAS

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

DATE FILED: July, 1983

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QUESTIONS PRESENTED FOR REVIEW

(1) Was Petitioner's confession involuntarily extracted from him in violation of his right to due process of law as that right is guaranteed to him by the Fourteenth Amendment to the United States Constitution because the prosecutor made a promise to Petitioner that if he (Petitioner) gave the statement and straightened the matter up, the Petitioner could probably go home, taking into consideration that in Bram vs. United States, 168 U.S. 532, 42 L Ed 568, 18 S Ct. 183 (1897) and in Hutto vs. Ross, 429 U.S. 28 50 L Ed 2d 194, 97 S Ct. 202 (1976) the true federal test of voluntariness was stated to be: "whether it (the confession) was extracted by any sort of threat or violence or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence"?

(2) Is the evidence sufficient, as a matter of law, consistent with the due process clause of the Fourteenth Amendment to the United States Constitution, to satisfy a rational trier of fact, beyond a

reasonable doubt, after viewing the evidence in the light most favorable to the prosecution, that the alleged victim of the rape had not consented to the intercourse with Petitioner, as that standard for review was announced in Jackson vs. Virginia, 443 U.S. 307, 61 L Ed 2d 560, 99 S Ct. 2781 (1979)?

TABLE OF CONTENTS

PAGE

Table of Authorities..... i

Reported Opinion..... 1

Statement of Jurisdiction..... 3

Constitutional Provisions..... 3

Statement of the Case..... 3

How Federal Questions Were Presented.....12

Reasons for Granting Writ of Certiorari..... 14

(1) The decision of the Court of Criminal Appeals of Texas conflicts with the earlier decision of the Supreme Court of the United States in Bram vs. United States, 168 U.S. 532 (1897) reaffirmed in Hutto vs. Ross, 429 U.S. 28 (1976) in refusing to exclude from evidence a confession that was extracted by any sort of threat or violence or obtained by any direct or implied promise, however slight, or by the exertion of any improper influence..... 14

(2) The decision of the Court of Criminal Appeals of Texas conflicts with the earlier decision of the Supreme Court of the United States in Jackson vs. Virginia, 443 U.S. 307 (1979) in sustaining Petitioner's conviction on the issue of sufficiency of the evidence because even after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have

been satisfied, beyond a reasonable doubt, that the alleged victim of the alleged rape had not consented to the intercourse with Petitioner therefore violating Petitioner's right to due process of law under the Fourteenth Amendment to the United States Constitution..... 17

Conclusion..... 26

Appendix A
Opinion of the Court of Criminal Appeals of Texas..... A-1

Appendix B
Findings of Fact and Conclusions of Law..... B-1

Appendix C
Ground of Error 1..... C-1

TABLE OF AUTHORITIES

PAGE

United States Constitution

Amendment 14, Due Process Clause..... 3, 17

Federal Statutes

28 U.S.C. Sec. 1257(3)..... 3

Federal Cases

Bram vs. United States
168 U.S. 532 (1897)..... 14, 15

Hutto vs. Ross
429 U.S. 28 (1976)..... 14, 15

Jackson vs. Virginia
443 U.S. 307 (1979)..... 13,17,20,25

Miranda vs. Arizona
384 U.S. 436 (1966)..... 4

Thompson vs. Louisville
362 U.S. 199..... 24, 25

In Re Winship
397 U.S. 358..... 19, 25

State Cases

Bosley vs. State
414 S.W.2d 468 (Tex. Crim. App. 1967).5

Wall vs. State
417 S.W. 2d 59, 62 (Tex. Crim.
App. 1967)..... 10

REPORTED OPINION

The opinion of the Court of Criminal Appeals of Texas is reported at 649 S.W. 2d 613 (Tex. Crim. App. 1982). Actually, this opinion consists of three separate majority opinions with dissenting and concurring opinions. On July 21, 1982, a three Judge panel of the Court of Criminal Appeals of Texas reversed Petitioner's conviction, having found the evidence insufficient to sustain conviction, and acquitted Petitioner. The original three Judge panel was composed of Presiding Judge Onion and Judges W.C. Davis and Teague. Judge Teague wrote the majority opinion and Judge W.C. Davis dissented without opinion.

On November 17, 1982, pursuant to the State's Motion for Rehearing En Banc, Judge Odom, writing for the majority, changed the disposition made by the three Judge panel on July 21, 1982, and found the evidence to be sufficient to sustain conviction because of Petitioner's confession but nevertheless reversed the conviction and remanded for a new trial because fundamental error was found in the Jury Charge since there was no paragraph applying the law to the

facts. The posture of the case then was that the case was reversed and remanded for a new trial rather than an acquittal being ordered. Judge McCormick concurred without opinion and Judge Clinton concurred with opinion. Judge Teague dissented with opinion.

On March 23, 1983, pursuant to Petitioner's Motion for Rehearing En Banc, Judge Campbell, writing for the majority, found the evidence to be sufficient to sustain conviction and he found Petitioner's confession to have been voluntarily extracted and still upheld the previous en banc opinion reversing and remanding the case for a new trial due to fundamental error in the Jury Charge. Judge Teague concurred in the result only.

On May 18, 1983, the Court of Criminal Appeals of Texas, without opinion, denied Petitioner Leave to File his Second Motion for Rehearing and Judge Teague dissented to the denial of leave to file with opinion.

All of the opinions are set out in Appendix A hereto.

STATEMENT OF JURISDICTION

The Court of Criminal Appeals of Texas timely received Petitioner's Motion for Leave to File and Second Motion for Rehearing En Banc on April 6, 1983. On May 18, 1983, Petitioner's Motion for Leave to File his Second Motion for Rehearing En Banc was denied, Judge Teague dissenting with opinion.

The jurisdiction over this Petition for Writ of Certiorari is conferred upon the Honorable Supreme Court of the United States by 28 U.S.C. Section 1257 (3) for review of the judgment of the highest court of a state for enforcement of any right claimed under the Constitution or statutes of the United States.

CONSTITUTIONAL PROVISIONS

Constitution

United States Constitution, Amendment Fourteen Due Process Clause

Nor shall any state deprive any person of life, liberty or property without due process of law.

STATEMENT OF THE CASE

This case involves a conviction for the offense

of rape. On July 4, 1977, the alleged victim of the rape was found nude and dead in a city park in the City of Haskell, Haskell County, Texas. Petitioner was either arrested and brought to the Haskell County Courthouse for questioning or was requested to come in for questioning (depending on whose testimony is believed) on July 5, 1977. In any event, Petitioner was administered the warnings required under Miranda vs. Arizona, 384 U.S. 436 (1966) at least twice before questioning began in conjunction with the nude and lifeless body found on July 4, 1977 in Haskell, Texas.

At first, Petitioner denied any involvement in the incident. Petitioner later on the night of July 5, 1977 signed a statement or confession (confession set out fully in Appendix A) admitting involvement with the alleged victim of the rape on the night of July 3, 1977 but denied having done anything to cause her death. Upon giving the confession, Petitioner was arrested for the offense of rape. Appellant was indicted by the Haskell County Grand Jury under the portion of the Texas Rape Statute

which makes it an offense to intentionally and knowingly have sexual intercourse with a woman, not one's wife, when the woman has not consented and when the perpetrator of the crime knows that the victim is physically unable to resist the intercourse.

At trial, before a Jury, Respondent began laying its predicate for the admissibility of Petitioner's confession. Before the confession was admitted into evidence before the Jury, Petitioner made his objection to the admissibility of said confession on grounds of involuntariness, among others, in a hearing outside the presence of the Jury. No pre-trial motion to suppress the confession was made, as one is not required under Texas law and inasmuch as an objection during trial suffices. See Bosley vs. State, 414 S.W. 2d 468 (Tex. Crim. App. 1967).

One prong of Petitioner's objection to the admissibility of the confession was that the confession was involuntarily extracted from Petitioner because a promise was made to him by Respondent, through its prosecutor, that if Petitioner signed the confession and cleared the matter up, Petitioner could go home.

Evidence was also introduced by the State to show that Petitioner and his accomplice had to pick up the victim and place her in Petitioner's car and that the victim did not enter Petitioner's car under her own power. There was also evidence adduced by the State, from a pathologist, that the probable cause of the victim's death was diabetes mellitus and that prior to, during and after sexual intercourse, the victim was lapsing into a diabetic coma. Petitioner's confession, of course, stated that Petitioner did not think the victim knew what was happening and that she was real sick or something else and at one point Petitioner states in his confession that he believed the victim was awful drunk.

From all of the foregoing, the Court of Criminal Appeals of Texas concluded that a Jury could reasonably infer that the victim was so impaired both mentally and physically that she could not effectively resist the advances of Petitioner. The Court of Criminal Appeals further went on to conclude that under the circumstances, proof that the victim had

not consented was demonstrated by imposibility. The Court of Criminal Appeals further concluded that the State demonstrated beyond a reasonable doubt that the victim was so severely impaired by diabetes mellitus prior to, during and after the attack that it would have been impossible for her to have consented to anything, including sexual intercourse (See Appendix A, Opinion on Appellant's Motion for Rehearing by Judge Campbell).

Other evidence in the case concerning the issue of whether the victim had consented to the intercourse or not came from Petitioner's accomplice, who testified for the State. The accomplice testified that after he and Petitioner and the victim were in Petitioner's car, he, the accomplice, specifically asked the victim if the accomplice and Petitioner could have sexual intercourse with her and that the victim consented. The accomplice further testified that the Petitioner had intercourse with the victim first and that then the accomplice had intercourse with the victim. The accomplice further testified that while he was having intercourse with the victim,

the victim was actively responding to the intercourse.

Respondent claimed that it had been surprised by the testimony of Petitioner's accomplice and used the accomplice's own confession in an attempt to impeach the accomplice. Whether or not the State succeeded in impeaching its own witness, the accomplice, is not for this writer to decide, but suffice it to say that under Texas law, it is not sufficient for Respondent to merely impeach exculpatory testimony of its own witness, but Respondent is required to disprove its own witness' exculpatory testimony by substantive evidence beyond a reasonable doubt. Wall vs. State, 417 S.W.2d 59, 62 (Tex. Crim. App. 1967).

Petitioner's own confession is not substantive evidence to disprove the accomplice's exculpatory testimony beyond a reasonable doubt because Petitioner's confession does not speak to whether the victim consented to the intercourse prior to the act of intercourse nor does Petitioner's confession deny that at the precise moment of intercourse, the victim did not consent. Under Texas law, the term "sexual intercourse"

has a very specific meaning, to-wit: the penetration of the female sex organ by the male sex organ. The concurring opinion of Judge Clinton and the original panel opinion of Judge Teague as well as Judge Teague's several dissents in Appendix A very ably state Petitioner's position on this issue.

One very crucial evidentiary matter not brought out by Respondent is whether a person such as the victim in this case who is in a diabetic coma or lapsing into a diabetic coma could fall asleep, thereafter awaken and immediately be coherent to others. While there is evidence that the victim was incoherent or passed out before being put into Petitioner's car and after the acts of intercourse with the victim by Petitioner and his accomplice, there is a serious absence of evidence to show that the victim did not consent to the intercourse after she got into Petitioner's car and during the actual acts of intercourse with Petitioner. There is, on the other hand, evidence from Petitioner's accomplice, a witness for Respondent, that when Petitioner, the victim and the accomplice were alone in Petitioner's car, the victim

did consent to the intercourse and there is likewise evidence that the victim was actively responding to the intercourse with the accomplice after the Petitioner had so engaged in intercourse.

How Federal Questions Were Presented: The question of the voluntariness of Petitioner's confession was first raised in the trial court via one prong of Petitioner's objection to the admissibility of Petitioner's confession (See Statement of Facts, Pages 317-318). Furthermore, the issue of the voluntariness of Petitioner's confession was raised in Brief for Appellant, Page 10, when said brief was filed with the trial court on March 15, 1979 (See Appendix C). It is significant to note that at the time that Petitioner's brief was filed with the trial court, the trial court still had the power, under Texas law, to grant a new trial, contrary to present Texas law, which took effect on September 1, 1981, which requires that the brief for Appellant be filed directly with the Court of Appeals and the trial court no longer, after September 1, 1981, has the power to grant a new trial at the time the

Brief for Appellant is filed.

The Court of Criminal Appeals of Texas (See Appendix A) decided the issue of the voluntariness of Petitioner's confession on Petitioner's Motion for Rehearing En Banc.

The issue of the sufficiency of the evidence, as a federal constitutional question, was not raised until Petitioner filed his first Motion for Rehearing En Banc. It is important to note that Brief for Appellant was filed on March 15, 1979 and that the case of Jackson vs. Virginia, 443 U.S. 307 (1979) was not decided by the Supreme Court of the United States until June 28, 1979. No objection was ever lodged by Respondent, with the Court of Criminal Appeals of Texas, to the raising of the issue of the sufficiency of the evidence, as a federal constitutional question, by Petitioner for the first time in his first Motion for Rehearing En Banc. The sufficiency of the evidence, although not on federal constitutional grounds, was raised by Petitioner in his original Brief for Appellant filed on March 15, 1979.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

(1) THE DECISION OF THE COURT OF CRIMINAL APPEALS OF TEXAS CONFLICTS WITH THE EARLIER DECISION OF THE SUPREME COURT OF THE UNITED STATES IN BRAM VS. UNITED STATES, 168 U.S. 532 (1897) REAFFIRMED IN HUTTO VS. ROSS, 429 U.S. 28 (1976) IN REFUSING TO EXCLUDE FROM EVIDENCE A CONFESSION THAT WAS EXTRACTED BY ANY SORT OF THREAT OR VIOLENCE OR OBTAINED BY ANY DIRECT OR IMPLIED PROMISE, HOWEVER SLIGHT, OR BY THE EXERTION OF ANY IMPROPER INFLUENCE.

In deciding the issue of the voluntariness of Petitioner's confession, the Court of Criminal Appeals of Texas (See Appendix A, Judge Campbell's opinion on Appellant's Motion for Rehearing) refused to address the issue in terms of the true federal test of voluntariness "whether it (the confession) was extracted by any sort of threat or violence or obtained by any direct or implied promise, however slight, or by the exertion of any improper influence" although Petitioner from the inception of his appeal through and including his several Motions for Rehearing repeatedly cited to

to the Court of Criminal Appeals of Texas the cases of Bram vs. United States, 168 U.S. 532 (1897) and Hutto vs. Ross, 429 U.S. 28 (1976). The lower court instead relied on an analysis based on the "totality of the circumstances" and concluded that Petitioner's true motive or inducement for confessing was his desire to avoid implication in causing the death of the victim.

While the "totality of the circumstances" may be a valid test in questions of voluntariness of confessions, the true federal test of voluntariness which speaks about extracting the confession by any direct or implied promises, however slight, cannot be ignored. It appears clear, from the language of Bram, supra, that if a direct or implied promise is any inducement to the giving of the confession, then it is rendered involuntary.

As pointed out previously, Petitioner testified that Respondent, through its prosecutor, made him an unequivocable promise that if he signed the confession, he could go home. The prosecutor denied having made an unequivocable promise to Petitioner

but did admit telling Petitioner that if he signed the confession and straightened the matter out, he could probably go home. It is important to note that both the Prosecutor's testimony as well as the opinion of the Court of Criminal Appeals of Texas acknowledge that prior to Petitioner giving his confession, the prosecutor knew that he could not prove that Petitioner had killed the victim because the victim had not been killed. The only possible concern in the prosecutor's mind was whether Petitioner had had sexual intercourse with the victim and whether such intercourse had been unlawful. Once Petitioner confessed, he was immediately arrested for the offense of rape and later indicted and tried. There was no homicide for Petitioner to avoid implication in and the prosecutor knew this. It is the exertion of an improper influence on Petitioner when the prosecutor knows that there has been no homicide, but he does not tell the Petitioner so the Petitioner's mind may rest at ease on this issue. This is no admission that Petitioner's desire to avoid implication in causing the death of the victim was Petitioner's inducement

to confess, but it does serve to point out the unfairness of the situation.

The true issue still remains whether the promise to Petitioner that he could probably go home after confessing was some inducement in extracting Petitioner's confession and the confession cannot stand as being voluntary. The Respondent's intent to get Petitioner to confess to the sexual intercourse and then charge him with the crime of rape is evident.

(2) THE DECISION OF THE COURT OF CRIMINAL APPEALS OF TEXAS CONFLICTS WITH THE EARLIER DECISION OF THE SUPREME COURT OF THE UNITED STATES IN JACKSON VS. VIRGINIA, 443 U.S. 307 (1979) IN SUSTAINING PETITIONER'S CONVICTION ON THE ISSUE OF THE SUFFICIENCY OF THE EVIDENCE BECAUSE EVEN AFTER VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, NO RATIONAL TRIER OF FACT COULD HAVE BEEN SATISFIED, BEYOND A REASONABLE DOUBT, THAT THE ALLEGED VICTIM OF THE ALLEGED RAPE HAD NOT CONSENTED TO THE INTERCOURSE WITH PETITIONER THEREFORE VIOLATING PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Judge Clinton's concurring opinion (See Appendix A) correctly points out that under the Texas rape statute the issue is whether the victim "has not consented" and not whether the victim was "unable to consent." It is interesting to note that the final en banc opinion of the Court of Criminal Appeals of Texas written by Judge Campbell on Petitioner's Motion for Rehearing (See Appendix A) finds that it was reasonable for the Jury to conclude that the victim was so impaired both mentally and physically that she could not effectively resist the advances of Petitioner that under the circumstances presented in Petitioner's case the requisite lack of consent was demonstrated by impossibility, that the severity of the victim's impairment was graphically demonstrated by the fact that she died at the scene of the attack shortly after intercourse with Petitioner and that the State demonstrated beyond a reasonable doubt that the victim was so severely impaired by diabetes mellitus prior to, during and after the attack that it would have been impossible for her to have voluntarily consented to anything

including sexual intercourse. It is clear, with all due respect and deference, that Judge Campbell, speaking for the majority of the Court of Criminal Appeals of Texas is still addressing the issue in terms of whether the victim "was unable to consent" rather than as correctly characterized by Judge Clinton in his concurring opinion that the issue is whether the victim "had not consented" which is the true element of the offense under consideration here.

Framing the issue correctly in terms of whether the victim "had not consented", it is apparent that no rational trier of fact, even while viewing all of the evidence in the light most favorable to the prosecution, could have been satisfied beyond a reasonable doubt that the victim "had not consented" to the intercourse with Petitioner. That Respondent's burden is to prove each and every element of the offense beyond a reasonable doubt is no longer open to question. In Re Winship, 397 U.S. 358. The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional

Petitioner's accomplice, Respondent's witness, testified that in response to a question by him (the accomplice) the victim consented to the intercourse with the accomplice and Petitioner while in Petitioner's car. While in Petitioner's car, only Petitioner, the victim and the accomplice were there, alone and with no one else present. Petitioner did not testify at his trial before the Jury. The victim was, of course, unfortunately, dead. The accomplice was the only one who could testify on the issue of whether or not the victim "had consented".

It is also clear from the record that Petitioner had had sexual intercourse with the victim on other occasions, with her consent. Judge Clinton's concurring opinion (See Appendix A) very aptly points out that under Texas law, the term "consent" is defined as "assent in fact, whether express or apparent". Judge Teague, in his original opinion points out that Respondent never established from the pathologist whether a person such as the victim could fall asleep, thereafter awaken, and immediately be coherent to

others. This is very important because the victim could have awakened after she got into Petitioner's car and could have consented to the intercourse as Petitioner's accomplice testified that she did. Judge Teague, in one of his dissenting opinions, very ably points out that Petitioner's confession, standing alone does not furnish necessary evidence to prove that the victim had not consented to the intercourse with Petitioner. He further goes on to point out in his dissent that the confession no where specifically and expressly states that the victim never consented to the act of sexual intercourse with the Petitioner nor does the confession ever state that the victim refused to have sexual intercourse with Petitioner.

Finally, Judge Teague points out that he does not believe that the mere failure of Petitioner to affirmatively state in the confession that the female did consent is sufficient to prove beyond a reasonable doubt that she did not consent, since there is no indication in the confession that the Petitioner at the time he made the confession was in

fact asked whether the victim did in fact consent.

Finally, it is respectfully pointed out that after Petitioner's accomplice, a State witness, offered exculpatory testimony on the issue of whether the victim "had not consented" Respondent was bound by that testimony unless it could disprove it beyond a reasonable doubt by other substantive evidence and not solely by impeachment. Respondent did not meet this burden of disproving the exculpatory testimony of its own witness.

In rejecting the "no evidence" rule of Thompson vs. Louisville,362 U.S. 199, the Supreme Court of the United States said: "That the Thompson "no evidence" rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. A mere modicum may satisfy a "no evidence" standard. Any evidence that is relevant -- that has any tendancy to make the existence of an element of a crime slightly more probable that it would be without the evidence could be deemed a "mere modicum". But it could not seriously be argued that such a

"modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt. The Thompson doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of Winship has been honored." Jackson vs. Virginia, 443 U.S. 307, 320 (1979). If the "no evidence" rule of Thompson vs. Louisville, supra, were still viable, Petitioner would probably have no complaint on this issue, but under the standard announced in Jackson vs. Virginia, supra, this conviction cannot stand.

CONCLUSION

Each of the two questions presented for review present serious federal constitutional issues. Petitioner respectfully requests that the Supreme Court of the United States grant certiorari so that the conflicts between the decision of the Court of Criminal Appeals of Texas with earlier decisions of the Supreme Court of the United States can be resolved.

Respectfully submitted,

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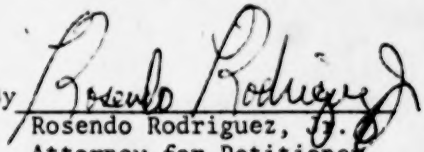
By 
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Date: July 15, 1983

APPENDIX A

OPINION OF THE COURT OF CRIMINAL APPEALS
OF TEXAS

ALBERTO PERALES ALVAREZ

Appellant

VS.
THE STATE OF TEXAS

APPELLEE

649 S.W. 2d 613 (Tex. Cr. App. 1982)

OPINION

TEAGUE, Judge

Alberto Perales Alvarez, Appellant, appeals his conviction by a jury for committing the offense of rape of a female who was "physically unable to resist." The same jury assessed appellant's punishment at confinement in the penitentiary for three (3) years.

Appellant challenges the sufficiency of the evidence. We agree with appellant that the evidence presented is insufficient and will order the conviction reversed.

The facts in this circumstantial evidence case reveal that the 19 year old victim, whom we will hereinafter refer to only as Linda, died while in a diabetic coma. From the evidence adduced, we are also able to infer that apparently no one, including Linda herself, was aware that she was suffering from acute sugar diabetes. Other than suffering from acute sugar

diabetes, Linda otherwise had the appearance of one who was in good physical condition and shape.

The State chose to prosecute appellant pursuant to the provisions of the rape statute, see V.T.C.A. Penal Code, Sec. 21.02(a),(b)(3), which provides that a person commits the offense of rape if he has sexual intercourse with a female not his wife without the female's consent and the intercourse occurs when the female was physically unable to resist.

It is axiomatic that the State is bound by the allegations stated in the charging instrument, and the State must prove those allegations beyond a reasonable doubt. Moore v. State, 531 S.W. 2d 140,142 (Tex. Cr. App. 1975); Seiffert v. State, 501 S.W. 2d 124 (Tex. Cr. App. 1973); Butler v. State, 429 S.W. 2d 497 (Tex. Cr. App. 1968). See also Jackson v. Virginia, 443 U.S. 307, 99 S.Ct.2781, 61 L.Ed. 2d 560 (1979). The two elements of lack of consent and physically unable to resist, like elements of any other crime, may be proved by the prosecution by circumstantial evidence, and indeed the trial court charged the jury in this cause that this was a circumstantial evidence

case. When reviewing the sufficiency of the evidence in a circumstantial evidence case, this Court has held many times, see 4 Teague & Helft, Texas Criminal Practice Guide, Sec. 90.06 (2)(c), that the evidence will be deemed insufficient to sustain proof of an alleged element or elements in the charging instrument unless the circumstances adduced exclude every other reasonable hypothesis except that of the guilt of the accused. Where a conviction rests upon circumstantial evidence, this Court also reviews the circumstantial evidence in light of the presumption that the accused is innocent. Furthermore, in a circumstantial evidence case, we will not presume any acts against the accused which are not shown to have been committed by him. Lastly, a convic- resting on circumstantial evidence will not be sustained on appeal, regardless of how horrible, ghastly, shocking, or revolting the facts may be, if the evidence does not sufficiently establish, either by direct or circumstantial evidence, all the material elements of the offense charged. Sewell v. State, 578 S.W. 2d 131, 135 (Tex. Cr. App. 1979). Every conviction based upon circumstantial evidence must necessarily be tested by its own facts to

determine on appeal whether the evidence is sufficient to sustain the verdict of guilt. Swink v. State, 617 S.W.2d 203 (Tex. Cr. App. 1981); Sinor v. State, 612 S.W.2d 591 (Tex. Cr. App. 1981); Earnhart v. State, 575 S.W.2d 551 (Tex. Cr. App. 1979).

After carefully reviewing the circumstantial evidence presented in this cause, we are unable to state, to a moral and reasonable certainty, that the appellant unlawfully had sexual intercourse with Linda, and have further concluded that the State has failed to exclude to a moral certainty, every other reasonable hypothesis except the appellant's guilt.

The facts show that on the day the appellant had sexual intercourse with her, Linda was a nymphomaniac and apparently had been a nymphomaniac since she was fourteen (14) years of age. It appears from the evidence adduced that in order to engage in sexual intercourse with Linda, all one had to do was ask her to engage in sexual intercourse, she would then consent, and she would thereafter engage in sexual intercourse with the person asking. On occasion she would also willingly and voluntarily engage in deviate sexual

intercourse with others. On the day prior to the day her body was found, Linda had been asked by another person, who was then with appellant, "Can we fuck you?," with Linda responding in the affirmative that they could. Thereafter, the appellant had sexual intercourse with Linda, after which the other male also had sexual intercourse with Linda. The next day the body of Linda was found in the vicinity, if not the exact location, where she had had sexual intercourse with appellant and the other person. By the testimony of the pathologist, who testified for the State in this cause, there was no indication on the body of Linda that the sexual intercourse she had had with appellant and the other person had been forcibly caused. Although the pathologist did not testify to a cause of death, we are able to discern from the pathologist's testimony that Linda probably died while in a diabetic coma. Also, from the evidence adduced, we have concluded that at times both before and after the time when appellant had sexual intercourse with Linda, Linda was lethargic, and may not have been at all times physically able to resist

or consent to having sexual intercourse. However, the evidence does not exclude to a moral certainty that at the actual time appellant had sexual intercourse with Linda she was then unable to consent or was physically unable to resist having sexual intercourse with the appellant.

Furthermore, when circumstantial evidence is weak, and the record affirmatively shows not only that other testimony which would have cast additional light on the facts was available to the prosecution, but the prosecution did not introduce such other evidence or satisfactorily account for its failure to do so, this Court will treat the case as one showing reasonable doubt of the sufficiency of the evidence to support the conviction. Schershel v. State, 575 S.W. 2d 548 (Tex. Cr. App. 1979). In this cause, another person was present during most of the time Linda was at the location where she had sexual intercourse with the appellant. However, this person was not called to testify by the State, nor did the State account for his absence.

Because of the absence in the record of conviction

OPINION ON STATE'S MOTION
FOR REHEARING

ODOM, Judge.

This is an appeal from a conviction for rape. Punishment was assessed at three years. On original submission a divided panel held the evidence was insufficient to support the conviction.

Appellant was prosecuted under V.T.C.A., Penal Code Sec. 21.02(a) and (b)(3), the indictment alleging that appellant did:

> "intentionally and knowingly have sexual intercourse with L____A____, a female not his wife, the said L____A____ not having consented thereto and the said (appellant) knowing that the said L____A____ was physically unable to resist."

In finding the evidence insufficient, the panel opinion stated:

> "...the evidence does not exclude to a moral certainty that at the actual time appellant had sexual intercourse with Linda she was unable to consent or was physically unable to resist having sexual intercourse with the appellant."

On rehearing the State points out that the panel did not consider appellant's confession when it discussed the sufficiency of the evidence. The confession introduced at trial recites:

"On the night of Sunday, July 3rd, 1977 about 10:00 or 10:15 P.M., I left my house in my car and drove around some in Haskell. I went to the old South Side grocery store where I saw Frank Enriquez and L____C____, and two other boys which I know but do not know their names at the South Side Grocery. I stopped and one of the boys, the taller of the two, and L____C____ got into my car, we had to help L____ get into the back seat, and we told the other boys to meet us in the park, I then drove down by the old depot and into the park where we stopped on the hill above the rest rooms. We all got out, and had to help L____ get out and she layed down on the ground and me and the other boy undressed her. She had on a white blouse with black stripes and a pair of pants, and some kind of shoes. She did have on panties and a bra which we also removed. She was kind of moving some but she was awful drunk or something. I had sexual intercurse with L____ and then the other boy did. After we had got through she was passed out and I took some beer that I had and poured it on her head to try and wake her up but we could not. She was breathing kind of like she was snoring. Me and the other boy got into my car and pulled down into the park by the rest rooms where we saw Frank Enriquez and the other boy's brother by the rest rooms. We all four walked back up the hill and looked at L____ and one of the brothers felt of her heart and said it was still beating and I could hear her breathing, sorta like she was snoring again. None of us knew what to do so we just decided to leave her there because we thought she was just drunk and would wake up in a couple of hours. We all walked back down to where my car was parked and I got in it and drove to the Colonial Food Store and got some cigarettes and then went home. I got home right at 11:00 P.M. During the time we were with L____ we had to help her in and out of the car and she was either

real drunk or something because I don't think she knew what was happening, she was real sick or something. Frankie Enriquez told me that he thought something was wrong with her because she had got worse the longer he was around her during the day. On July 4th, 1977 me and a bunch of my kinfolks went to the park North of Knox City, Texas about 5:00 P.M. and come back about 9:00 P.M., when we got back to Mother-in-laws she told us that L____C____ had been found dead in the park. We heard that she had been cut up or stabbed but she was not hurt anyway when we left her in the park. She was just drunk or doped or sick, I don't know which. But none of us four hurt her anyway. We just left her where she was laying because we thought she would get all right in a couple of hours."

Other evidence established that L.A., alleged in the indictment, was the same person, also known as L.C., referred to in the confession and by some witnesses at trial.

(1) We find the confession is sufficient to prove the deficiencies found by the panel, and hold the evidence supports the con iction. The judgment ordering an acquittal for insufficient evidence is set aside.

(2) We have found fundamental error in the jury charge that requires reversal. There is no paragraph in the charge applying the law to the facts. This requires reversal. Williams v. State, Tex.Cr.App., 547 S.W.2d 18; Harris v. State, Tex. Cr. App., 522 S.W.2d 199.

The State's motion for rehearing is granted in part and denied in part; the judgment is reversed and the cause remanded.

McCORMICK, J., concurs.

CLINTON, Judge, concurring.

At this point in our treatment of the problem of sufficiency of evidence under V.T.C.A. Penal Code, Sec. 21.02(a) and (b)(3) there is still some confusion that needs to be addressed, particularly since this cause presents a matter of first impression.

The statute provides that sexual intercourse is without consent when, in the order prescribed by it and alleged in the indictment:

(1) the female has not consented; and

(2) the accused knows

(3) the female is physically unable to resist.

The panel opinion found evidence insufficient, partly because it does not exclude that at the precise moment of intercourse that the female "was unable to consent." (Emphasis added) With all deference, inability or incapacity to consent is not an element of the offense pleaded in this cause. The question

is whether evidence is sufficient to show that she "has not consented:" that is, she has not "assent(ed) in fact, whether express or apparent," id., Sec.1.07(a)(9).

Then the opinion of the Court En Banc points to and sets out appellant's confession, and concludes that it is "sufficient to prove the deficiencies found by the panel." Applied precisely, that means that within the confession is ample evidence that the female "was unable to consent," for that is one of the deficiencies found by the panel. Strictly speaking, it does not mean that evidence is sufficient to affirmatively show she did not "assent in fact" to intercourse, although certain recitations in the confession seem to adequately raise that inference.

I therefore concur in both the reasoning and judgment of the majority opinion, and write only to point out a conceptual uniqueness which distinguishes the provision in issue[1] from other rape proscriptions contained in Sec. 21.02(b).

[1] The requirement of affirmative proof that the female did not "assent in fact" also characterizes subsection (b)(5).

TEAGUE, Judge, dissenting.

Because I am still convinced that the evidence presented by the State was insufficient as a matter of law to sustain the verdict of the jury finding the appellant guilty of rape, I must therefore respectfully dissent to the majority's holding that the evidence was sufficient to sustain the verdict of the jury.

Appellant was charged with violating V.T.C.A., Penal Code, Sec. 21.02(b)(3), which provides that the offense of rape occurs if the female has not consented and the defendant knows that she is unconscious or physically unable to resist. By virtue of the express wording of the statute, in order to legally convict a person of violating the stated provisions of the rape statute, the State must prove both of these elements of the offense. When I authored the majority panel opinion, and reached the result that the evidence was insufficient to sustain the verdict of the jury, I considered the fact that the appellant had given a confession. However, I did not find it added anything to what I discerned the facts

of the case to be. And I still don't. The majority has now concluded that the evidence is sufficient to establish that both of the above elements were proved by the State. Nowhere, however, does the majority opinion explain or inform us how such a conclusion was reached.

Even viewing the facts in a light most favorable to the verdict of the jury, as this Court is required to do, I am still unable to conclude from all of the facts the State presented that the evidence is sufficient to show that the appellant knew at the time of the sexual intercourse that the female was physically unable to resist.

Be that as it may, I am unable to understand how anyone can reasonably conclude that the appellant's confession, standing alone, is sufficient to establish that the female did not consent to sexual intercourse with the appellant. Again, not only must the State prove that the female was physically unable to resist, but additionally must prove that when the act of sexual intercourse occurred, she did not consent to the act of sexual intercourse. This is the

way the Legislature wrote the statute and it is our duty to give the statute a reasonable interpretation.

The majority implicitly holds that the confession, standing alone, furnishes necessary evidence to prove both of the required statutory elements. I totally disagree with this conclusion. The confession nowhere specifically and expressly states that the female never consented to the act of sexual intercourse with the appellant, nor does the confession ever state that she refused to have sexual intercourse with the appellant. I do not believe that the mere failure of the appellant to affirmatively state in the confession that the female did consent is sufficient to prove beyond a reasonable doubt that she did not consent, since there is no indication in the confession that the appellant at the time he made the statement was in fact queried as to whether she did in fact consent. It was the State's burden and not the appellant's burden to prove that the female did not consent to having sexual intercourse with appellant prior to their having sexual intercourse. In fact, one of the State's very own witnesses testified that the female did consent

to the act of sexual intercourse shortly after she entered the appellant's automobile. This fact was never contradicted by the State, either by the apellant's confession or by any medical testimony that she would not have been able to consent--if in fact she had previously lapsed into unconsciousness due to her diabetic condition. And that was my point when I may have overly chastised the prosecuting attorney in stating that a more probing examination of the pathologist should have occurred.

Furthermore, this is a conviction based upon circumstantial evidence. There is absolutely nothing in the record of appeal to rebut the reasonable hypothesis that the female voluntarily entered appellant's vehicle, although appearing intoxicated to appellant, but thereafter consented to having sexual intercourse with the appellant, especially in light of other unrebutted testimony that the female had engaged in sexual intercourse with the appellant on at least one other occasion.

The conduct of the appellant and others in this cause, in leaving the female in a city park,

while nude and torpid, continues to fill me with revulsion, and such conduct will always be repugnant to my sensibilities. But that is not the issue before this Court. Our man-made, legislatively enacted law, does not proscribe a male having sexual intercourse with a female who has become unconscious--if that female has consented to having sexual intercourse before becoming unconscious.

In light of the State's demonstrated failure to prove beyond a reasonable doubt the lack of consent by the female, I must respectfully dissent to the majority's unexplained conclusion that the evidence is sufficient to prove such a lack of consent.

OPINION ON APPELLANT'S MOTION
FOR REHEARING

CAMPBELL, Judge

This is an appeal from a conviction for rape. Punishment is three years imprisonment. On original submission a divided panel held that the evidence presented at trial was insufficient to support conviction. On the State's motion for rehearing the court en banc reversed and remanded the cause holding fundamental error existed in the jury charge. On

State's motion for rehearing the court expressly held sufficient evidence existed to support the conviction. Due to our disposition of this cause on the State's motion for rehearing, we now find it necessary to address a ground of error which was previously unanswered due to the panel's resolution of the case.

In his motion for rehearing appellant asserts that the trial court erred by admitting into evidence appellant's confession because it was procured involuntarily. Additionally, appellant contends that this court erred in holding that sufficient evidence was presented to establish that the sexual intercourse took place without the victim's consent and that the victim was unable to resist.

On July 3, 1977, the victim, L____C____, while in the Haskell city park became sick or ill, in the presence of Frank Enriquez, Crispin and Robert Martinez. L____C____ left the park on foot, staggering until she fell down in a nearby vacant lot. After collapsing in the vacant lot the victim was loaded into the appellant's automobile by the

appellant and Crispin Martinez. Appellant drove the victim to a secluded location near the city swimming pool. There the appellant and Crispin Martinez had sexual intercourse with L____C____.

On July 4, 1977, the naked body of L____C____ was found at the same location appellant and Crispin Martinez had had intercourse with L____C____. Testimony at trial established that she had died sometime after having intercourse with the appellant. The probable cause of death was diabetes mellitus.

On July 5, 1977, appellant was questioned by the Haskell police and district attorney. After giving a statement admitting his involvement in the abduction and rape of L____C____ appellant was arrested.

The appellant contends the trial court erred by admitting into evidence his confession. Specifically, appellant maintains that the confession was rendered involuntary because it was induced by the district attorney's promise that he "could probably go home" after giving a statement.

(3) It is an established rule of law that a

"Q. (DEFENSE COUNSEL); Was that a further inducement to you to sign the written statement?

"A. (APPELLANT): Yes, sir, because I told Mr. Beauchamp that I wanted this thing settled pretty quick because I was thinging about my wife. I knew I had been out with a girl, but I knew that I hadn't done anything bad to her or anything. That's why I wanted--you know, about that it would be settled without her knowing anything about it, I went ahead."

Furthermore, the appellant's motivation for making a confession may be ascertained directly from the statement itself:

"...We heard that she had been cut up or stabbed but she was not hurt in any way when we left her in the park... But none of us four hurt her anyway."

Clearly, examining the totality of the circumstances, the prosecutor's remark was not the primary incentive behind appellant's confession. We hold the confession was voluntary and therefore admissible.

Appellant was indicted under V.T.C.A. Penal Code, Sec. 21.02(a) and (b)(3). In pertinent part, the indictment alleged that the appellant did:

"intentionally and knowingly have sexual intercourse with L____A_____, a female not his wife, the said L_____A_____ not having consented thereto and the said

(appellant) knowing that the said L_____ A_____ was physically unable to resist."

The statutory provisions of Sec. 21.02 which was relied upon in the indictment prescribe:

"Sec. 21.02. Rape.

"(a) A person commits an offense if he has sexual intercourse with a female not his wife without the female's consent.

"(b) The intercourse is without the female's consent under...the following circumstances:

"* * *

"(3) She has not consented and the accused knows she is unconscious or physically unable to resist."

On rehearing, this Court, in an opinion by Judge Odom, held that the confession of the appellant "is sufficient to prove the deficiencies found by the panel, and hold the evidence supports the conviction." The confession which was introduced at trial provides:

"On the night of Sunday, July 3rd, 1977 about 10:00 or 10:15 P.M., I left my house in my car and drove around some in Haskell. I went to the old South Side grocery store where I saw Frank Enrique and L____ C____, and two other boys which I know but do not know their names at the South Side Grocery. I stopped and one of the boys, the taller of the two, and L_____

C_____ got into my car, we had to help L_____ get into the back seat, and we told the other boys to meet us in the park, I then drove down by the old depot and into the park where we stopped on the hill above the rest rooms. We all got out, and had to help L_____ get out and she layed down on the ground and me and the other boy undressed her. She had on a white blouse with black stripes and a pair of pants, and some kind of shoes. She did have on painties and a bra which we also removed. She was kind of moving some but she was awful drunk or something. I had sexual intercourse with L_____ and then the other boy did. After we had got through she was passed out and I took some beer that I had and poured it on her head to try to wake her up but we could not. She was breathing kind of like she was snoring. Me and the other boy got into my car and pulled down into the park by the rest rooms where we saw Frank Enriquez and the other boy's brother by the rest rooms. We all four walked back up the hill and looked at L_____ and one of the brothers felt of her heart and said it was still beating and I could hear her breathing, sorta like she was snoring again. None of us knew what to do so we just decided to leave her there because we thought she was just drunk and would wake up in a couple of hours. We all walked back down to where my car was parked and I got in it and drove to the Colonial Food Store and got some cigarettes and then went home. I got home right at 11:00 P.M. During the time we were with L_____ we had to help her in and out of the car and she was either real drunk or something, because I don't think she knew what was happening, she was real sick or something. Frankie Enriquez told me that he thought something was wrong with her because she had got worse the longer he was around her during the day. On July 4th, 1977 me and a bunch of my kinfolks went to the park North of Knox City, Texas about 5:00 P.M. and come back about 9:00 P.M., when we got back to Mother-in-laws she told us that L_____C_____ had been found dead

in the park. We heard that she had been cut up or stabbed but she was not hurt anyway when we left her in the park. She was just drunk or doped or sick, I don't know which. But none of us four hurt her anyway. We just left her where she was laying because we thought she would get all right in a couple of hours."

From a thorough review of both the appellant's confession as well as the trial court record it was reasonable for the jury to infer appellant was aware of the victim's incoherency as prescribed in Sec. 21.02, supra. Clearly, the appellant realized that the female "was unable to resist." This element can be directly inferred from the appellant's admission in the confession that:

"During the time we were with L_____ we had to help her in and out of the car and she was either real drunk or something, because I don't think she knew what was happening, she was real sick or something."

Our inquiry is therefore now directed to the sole issue of determining whether or not sufficient evidence was presented to establish the victim "has not consented" per Sec. 21.02(b)(3), supra. The Penal Code provides the following general definition for "consent":

"'Consent' means assent in fact, whether express or apparent." Sec. 1.07(9), V.T.C.A. Penal Code.

In the instant situation testimony introduced at trial established that the victim was suffering from acute diabetes mellitus. Prior to, during, and after having sexual intercourse L____C____ was lapsing into a diabetic coma. Her condition was analogized to intoxication by Dr. Williams, the pathologist who performed the autopsy:

"Q. (DEFENSE COUNSEL): ... At certain stages of intoxication (a person suffering from diabetes mellitus) develops lethargy and the same symptoms, does it not?

"A. Oh yes. I think in that respect, the symptoms could easily be confused.

* * * * * * *

"Q. Now, a person suffering from an undiagnosed case of diabetes mellitus could appear to be sleepy, could they not?

"A. Yes.

"Q. Drowsy, or might have some difficulty walking?

"A. These are all--these can all be, I think, housed in the word lethargic.

* * * * * * *

"Q. Now, this--once you advance to the lethargic stage, of the diabetes mellitus, the nervous system is affected, is it not?

"A. Yes, because the body then goes into what's called a coma--state of coma, which is a more advanced form of lethargy where breathing may become very slow and eventually may cease. The body develops what is called in medical terms an acidosis, and then this acetone breath becomes quite profound.

"Q. But it's principally the, effecting the nervous or mental system, is it not?

"A. The vital centers, yes."

Additionally, the victim's lack of consent is demonstrated by the testimony of eyewitness Frank Enriquez. Witness Enriquez testified regarding the victim's apparent physical condition as well as her abduction and rape. The witness stated that he met the victim in the park on July 3 at approximately 5:00 p.m. and engaged her in conversation. When he first approached her she appeared physically normal. However, as their conversation progressed the victim began "staggering all over the place."

Enriquez testified that the victim became so unsteady that Robert Martinez had to help her walk.

"Q. (PROSECUTOR): How was he helping her?

"A. (WITNESS): He put his hand around her--grabbed her so she wouldn't fall.

"Q. All right did L_____ ever mention that she was sick?

"A. Yes, sir, when she got out of the monkey cage--

* * * * * * * *

"Q. Did L_____ ever indicate to you that she was sick?

"A. Yes, sir, she did.

"Q. Did she ever ask you to take her home or help her in any way?

"A. She told us to take her home."

Enriquez continues to testify regarding the deteriorating physical condition of the victim prior to the appellant's arrival on the scene.

"Q. (PROSECUTOR): What did you do when you got to the South Side Grocery?

"A. (WITNESS): We stayed there a little while and then Crispin went up there where they was, and L_____ she was sweating real bad, you know. She barely had her eyes open.

"Q. What do you mean sweating real bad?

"A. She had a lot of sweat on her face.

"Q. Did she ever say anything?

"A. No sir.

"Q. How was she located--standing up or laying down?

"A. Laying down.

"Q. On her stomach or on her back or--

"A. On her back.

"Q. In other words, Frank, how would you describe her condition--was she awake or passed out or--

"A. Passed out."

Witness Enriquez continues by describing the events that occurred upon appellant's arrival at the location where the victim had collapsed.

"Q. Then what did he do?

"A. He and Crispin--he picked L_____ up and they put her in the car.

"Q. You said 'they put her in the car'--what do you mean?

"A. They grabbed her and they put her in the car.

"Q. Grabbed her and put her in the car?

* * * * * * * *

"Q. L_____ didn't walk to the car?

"A. She didn't walk.

"Q. Are you sure?

"A. I'm sure."

Enriquez then described the victim's condition after the appellant had intercourse with her:

"Q. Did L_____ have any clothes on?

"A. No, sir.

"Q. Was L_____ awake?

"A. No, sir.

* * * * * * * *

"Q. Did she ever raise up?

"A. No.

"Q. Did she ever move"

"A. No, she was just breathing.

"Q. Just breathing.

"A. Breathing hard.

"Q. Was she having a hard time breathing?

"A. Yes, sir.

"Q. Did you try to help L_____ in any way, Frank?

* * * * * * * *

"Q. Did you ask anybody else to help her?

"A. I asked Alberto and them to put her clothes on and Alberto he just picked them clothes up and dropped them on her like that.

"Q. What did Alberto say then?

"A. He said 'let's go', so we left.

"Q. And where did you go to?

"A. We went down where his car was, and he got in his car and left and went back to Elsie's."

From the record it was reasonable for the jury to conclude that the victim was so impaired both mentally and physically that she could not effectively resist the advances of appellant. Under the circumstances presented in the instant situation the requisite of lack of consent was demonstrated by impossibility. The severity of the victim's impairment was graphically demonstrated by the fact that she died at the scene of the attack shortly after having intercourse with the appellant.

In the instant situation the State demonstrated beyond a reasonable doubt that the victim was so severely impaired by diabetes mellitus prior to, during and after the attack that it would have been impossible for her to have voluntarily consented to anything including sexual intercourse.[2] Sufficient

[2]We expressly note that the factual context of this case is unique. We reserve ruling on conceivable situations where the victim was coherent and gave effective consent and prior to the completion of the act of intercourse a physical or mental impairment arose.

evidence is presented in the record to convict.

Judge Odom's opinion on the State's motion for rehearing reached the proper conclusion:

> "We have found fundamental error in the jury charge that requires reversal. There is no paragraph in the charge applying the law to the facts. This requires reversal. Williams v. State (Tex.Cr.App.), 547 S.W.2d 18; Harris v. State (Tex.Cr.App.), 522 S.W. 2d 199."

The judgment is reversed and the cause remanded for a new trial.

TEAGUE, J. concurs in the result only.

TEAGUE, Judge, dissenting.

Appellant urges in his second motion for rehearing that this Court should reverse the conviction because the evidence is insufficient. To the Court's failure to grant appellant leave to file the second motion for rehearing, reconsider the issue, and reverse the confiction for insufficiency of the evidence, I dissent.

I now find myself totally unable to agree with the last opinion of this Court, as to its version of the facts.

Crispin Martinez, who testified for the State, specifically testified that after he and appellant

got in the automobile with the victim, L____C____, she specifically consented to have sexual intercourse with both appellant and Martinez, and thereafter they each had sexual intercourse with her. Therefore, the State had the burden of specifically rebutting the testimony of Martinez, to prove the offense of rape under V.T.C.A., Penal Code, Sec. 21.02(b)(3). It did not, however, satisfy that burden.

This Court, in its last opinion, to reject the appellant's claim that the evidence is insufficient to sustain the verdict of the jury, stated in part that it was relying upon a statement in appellant's confession, to-wit: "I don't think she knew what was happening," to establish that L____C____ was incapable of consenting to have sexual intercourse with appellant and Martinez at the time Martinez said she agreed to have sexual intercourse with him and appellant. However, such a statement is just as consistent with an interpretation that appellant thought she was groggy, but still able to consent to the act of sexual intercourse. Especially is this true when one considers that L____C____ had

APPENDIX B

No. 5006

THE STATE OF TEXAS	I	IN THE DISTRICT COURT
	I	
VS.	I	OF
	I	
ALBERTO PERALES ALVAREZ	I	HASKELL COUNTY, TEXAS

BE IT REMEMBERED that on the 4th day of October, 1978, at and during the guilt or innocence phase of the trial of the above entitled and numbered cause when the prosecution sought to introduce into evidence the confession of the defendant, dated July 5, 1977, the defendant, by and through his retained counsel, objected to the introduction of said confession and requested a separate hearing on the voluntariness of said confession in accordance with Article 38.22 of the Code of Criminal Procedure of the State of Texas. Whereupon, the jury was removed from the courtroom and then and there a hearing was had on the voluntariness of said confession. Defense counsel also attacked the validity of said confession on the further grounds that same was made by the defendant while he was under illegal restraint and for the reason that said confession gave details of an extraneous offense. In compliance with Article

38.22 of the Code of Criminal Procedure, the Court now makes its findings of fact and conclusions of law with respect to the hearing on the voluntariness of said confession and also with respect to the other defects pointed out by counsel.

FINDINGS OF FACT

The court finds that after the defendant was located at the ballpark in the city park at Haskell, in Haskell County, Texas, by Officers Merchant and Goss, he accompanied them to the courthouse; that the defendant thereafter was taken before a magistrate who informed the defendant of his rights; that at 8:40 o'clock p.m. on July 5, 1977, Larry L. Beauchamp, who was the investigator for the District Attorney of the 39th Judicial District, administered said rights consisting of the following: you have a right to have a lawyer present to advise you either prior to any questioning or during any questioning; if you are unable to employ a lawyer, you have the right to have a lawyer appointed to counsel with you prior to or during any questioning; you have the right to remain silent, and not make

any statement at all, and that any statement you do make may be used in evidence against you at your trial; if you decide to answer questions now without a lawyer present, you will still have the right to stop answering questions at any time. You also have the right to stop answering at any time until you have talked to a lawyer. That at said time, the defendant, Alberto Alvarez, waived his rights in the following language: "I have read this statement of my rights (or have had this statement read to me by the above named person) and I understand what my rights are. I am willing to voluntarily make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me." The court finds that said waiver of rights was intelligently, knowingly, and voluntarily made. That thereafter, at 9:20 o'clock p.m., on the 5th day of July, 1977, the defendant was carried before a magistrate, who informed the defendant of the accusation against him and of any affidavit

filed therewith, of the defendant's right to retain counsel, of the defendant's right to request appointment of counsel if indigent and unable to afford counsel, of defendant's right to remain silent, of defendant's right to have an attorney present during any interview with peace officers or attorneys representing the state, of defendant's right to terminate the interview at any time, of defendant's right to have an examining trial, and that he was not required to make a statement and that any statement made by him could be used against him; that the defendant did then knowingly waive his right to an attorney and that the defendant did then freely and voluntarily, without being induced by any compulsion, threats, promises, or persuasion, make and sign a confession in writing; that at said time, said defendant, knowingly, intelligently, and voluntarily signed said confession heretofore mentioned, same being witnessed by Marshall Brown and James E. Toland.

The above findings of fact are based on all of the testimony adduced at and during the hearing in connection with the admission of said confession and

the argument of counsel thereafter.

CONCLUSIONS OF LAW

I conclude as a matter of law, that the confession of Alberto Alvarez, dated July 5, 1977, witnessed by Marchall Brown and James E. Toland, is valid and is admissible as evidence against him in this criminal proceeding.

In view of the above findings and conclusions, the court here now overrules the motion of the defendant to suppress said confession on all grounds and for all reasons raised by the defendant, same being the voluntariness of the confession, the illegal arrest of the defendant, and the extraneous offense claimed by the defendant.

THIS the 4th day of October, 1978.

/s/ William P. Ratliff
JUDGE PRESIDING

APPENDIX C

GROUND OF ERROR 1: The Trial Court erred in overruling appellant's objection to the admissibility of his confession or in overruling his Motion to Suppress said confession because the said confession was involuntarily given by appellant in violation of his 14th Amendment right to due process of law inasmuch as the State's promise that he could "probably go home" after giving his confession was an inducement to the giving of the confession.